

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 76.51(a)(1))
of the Commission's Rules to Include)
Newton, New Jersey, and)
Riverhead, New York in the New York,)
N.Y. - Linden - Paterson - Newark,)
New Jersey, Major Television)
Market (#1))

MM Docket No. 93-290

To: Chief, Mass Media Bureau

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

INTRODUCTION AND SUMMARY

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby files its comments in response to the above-captioned Notice of Proposed Rulemaking ("Notice")^{1/} proposing, inter alia, to redesignate the New York, New York-Linden-Paterson-Newark, New Jersey television market (the "New York market") to include Riverhead, New York and Newton, New Jersey. Cablevision serves approximately 1,127,000 subscribers within the New York Area of Dominant Influence ("ADI"), pursuant to authorizations from franchising authorities in New York, New Jersey and Connecticut.^{2/} If adopted, the proposals set forth in the Notice would

^{1/} Notice, MM Docket No. 93-290 (rel. Nov. 16, 1993).

^{2/} As the Commission indicates in the Notice, Cablevision has filed a Petition for Special Relief in a separate proceeding seeking to modify the markets of WLIG, WMBC, WTZA, WHAI and WTBY to delete certain communities from the television markets of these stations for must carry purposes. In re Petition of Cablevision Systems Corporation for Modification of ADI, CSR-3873-A (filed May 28, 1993) ("Petition for Special Relief"). Cablevision's Petition is pending.

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unjustifiably burden Cablevision with signal carriage requirements in excess of those contemplated by the 1992 Cable Act. Despite the Commission's intent to act in this docket "without prejudice" to Cablevision's Petition for Special Relief,^{3/} moreover, redesignation of the New York market to include Riverhead and Newton without concurrently deciding Cablevision's Petition for Special Relief could "qualify" non-local stations for must carry status in communities that may later be found to be outside of the television markets of those stations under the must carry rules.

It is well-established that the Commission may not redesignate a television market -- particularly one as "large and complex"^{4/} as New York -- to include an additional community unless the station licensed to that community makes a showing of "competitive commonality" with other presently designated communities. Neither WLIG, which has elsewhere characterized itself as a distinctly local Long Island station, nor WMBC has made a showing sufficient to warrant the addition of their respective communities of license to the New York market. In the absence of such a showing, a station should not be entitled to assert exclusivity rights on cable systems outside the zone specified for its community of license.

Grant of the pending requests for redesignation, or other similar requests, would also undermine the balance between copyright and signal carriage obligations established in the 1992 Cable Act. Congress did not automatically confer must carry rights throughout the entire ADI, but rather required each local broadcaster to "qualify" for carriage within an ADI by delivering a good quality signal and, if necessary, by indemnifying the cable operator for any increased copyright liability associated with carriage. Congress could have, but did not, make a station's

^{3/} See Notice at ¶ 2, n.2.

^{4/} Id. at ¶ 14.

must carry and copyright/exclusivity rights coextensive. WLIG, WMBC and other stations should not be permitted to end-run this statutory scheme by using the market redesignation process to expand their must carry rights, particularly when such stations are unable to make the showing of competitive commonality required in past market redesignation cases.

ARGUMENT

I. WLIG AND WMBC HAVE FAILED TO DEMONSTRATE SUFFICIENT COMMONALITY BETWEEN THE PROPOSED COMMUNITIES AND THE MARKET AS A WHOLE TO WARRANT REDESIGNATION

In assessing petitions to modify the television market list contained in Section 76.51 of its rules, the Commission expects petitioners to provide evidence demonstrating competitive "commonality between the proposed community to be added to a market designation and the market as a whole."^{5/} Four factors are relevant to such an assessment: the distance between the existing designated communities and the community proposed to be added; whether cable carriage in the existing television market would extend to areas outside the petitioning station's Grade B contour; a clear showing of particularized need for the proposed change in market designation; and an indication of the public benefits that would result from the proposed change.^{6/} Neither WLIG, which has elsewhere characterized itself as a distinctly local Long Island station,^{7/} nor WMBC have presented evidence to satisfy these factors.

^{5/} Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965, 2978 (1993) ("Must Carry Report and Order").

^{6/} Notice at ¶ 3.

^{7/} For example, in its civil antitrust suit filed against Cablevision, see WLIG Petition for Rulemaking at 4 (filed July 14, 1993), WLIG has characterized itself as serving Nassau and Suffolk Counties, areas which it alleges form "a discrete segment of the New York City metropolitan area, with 900,000 homes, having its own issues related to government, politics, environment, law enforcement, traffic, transportation, energy, leisure activities, and sports. See (continued...)

WLIG's community of license, Riverhead, is substantially distant from all of the communities currently within the designated New York market.^{8/} Those communities are either at the fringe of WLIG's Grade B signal coverage area (e.g., portions of The Bronx, Brooklyn and Queens) or outside the station's Grade B contour altogether (Paterson, Linden, Newark, Newton, and areas in and around New York City, including Manhattan and Staten Island).^{9/} Similarly, the areas in and around New York City are all at the fringe of or outside WMBC's Grade B contour.^{10/} WLIG and WMBC have also failed to demonstrate that their signals are available or viewable off-air throughout most of the area involved, that without the requested redesignation the stations would be denied access to most of their natural off-air market,^{11/} and neither WLIG nor WMBC have shown that they genuinely compete for audiences or programming throughout the New York television market.^{12/} For example, neither station

^{2/}(...continued)

Complaint, WLIG-TV, Inc. v. Cablevision Systems Corporation, No. CV-93-3019 (E.D.N.Y., filed July 8, 1993) at 6. Significantly, WLIG has identified itself on air as Long Island's station.

^{8/} Riverhead is approximately 70 to 80 miles from New York, New York; and 80 to 100 miles from Linden, Paterson, and Newark, New Jersey. Newton, New Jersey is approximately 100 miles or more from Riverhead, New York.

^{9/} Notice at ¶ 9; WLIG Petition at 8-9.

^{10/} WMBC Petition, Attachment C (filed June 14, 1993).

^{11/} See Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, Fla.), 102 FCC 2d 1062, 1072-73 (1985) (considering whether the station sought carriage in areas in which most of its natural over-the-air audience was located).

^{12/} See Request by Press Broadcasting Company, Inc. to Amend Section 76.51 of the Commission's Rules to Include Clermont, Florida, in the Orlando-Daytona Beach-Melbourne-Cocoa, Florida, Television Market, Report and Order, 8 FCC Rcd 3667 (1993).

claims that it pays syndicators the full New York market rates for programming.^{13/} Nor do the stations present evidence such as market-area program listings to demonstrate that the stations are considered "local" throughout the existing, designated communities.^{14/} In the absence of meaningful supporting evidence, WLIG's and WMBC's requests should be denied.

II. GRANT OF THE RELIEF REQUESTED BY WLIG WOULD CONFER MUST CARRY RIGHTS IN EXCESS OF THOSE ESTABLISHED BY CONGRESS

WLIG's and WMBC's requests for redesignation of the New York market are thinly-veiled efforts to obtain must carry rights in communities with which they have no local nexus. Their requests, if granted, would upset the balance between copyright and signal carriage obligations established by the 1992 Cable Act^{15/} by automatically according these stations must carry status far beyond the local communities that they are licensed to serve. By "qualifying" WLIG and WMBC for carriage in communities that may subsequently be found to be outside the television market of these stations for must carry purposes, moreover, the Commission would "prejudice" Cablevision's Petition for Special Relief.^{16/} The forced carriage of these

^{13/} If the New York market were expanded to include Riverhead, WLIG would be forced to bid for programming against much larger stations and at higher rates than it may currently pay. Under those circumstances, it is likely that WLIG would no longer be able to purchase the rights to popular programming it can currently afford because it is outside the New York market.

^{14/} See Request by TV 14, Inc., Notice of Proposed Rulemaking, 7 FCC Rcd 8591, 8592 (1992) (referring to station's showing that program syndicators and market-area program listings consider the Rome station to be part of the Atlanta market); Major Television Markets (Fresno-Visalia, Calif.), 57 RR 2d 1125 (1985) (citing inability of station to obtain non-network exclusivity even though station paid Fresno rates for programming).

^{15/} See 47 U.S.C. § 534.

^{16/} Cf. Notice at ¶ 2, n.2 ("[a]ny action to amend Section 76.51 of the Rules as proposed is . . . without prejudice to Cablevision's efforts to defeat the must carry status of these stations").

stations pending action on Cablevision's Petition for Special Relief would create extraordinary and unnecessary service disruptions to Cablevision's subscribers.

The must carry provisions of the 1992 Cable Act were intended to "serve the goals contained in Section 307(b) of the Communications Act of 1934 of providing a fair, efficient and equitable distribution of broadcast services"^{17/} and to ensure the "local origination of programming,"^{18/} so that a television station assigned to a particular community would continue to be able to provide news, public affairs programming, and emergency programming services responsive to the needs of that community.^{19/}

A station is entitled to must carry status only if it is "qualified" for carriage. A station is not qualified if, inter alia, it is a distant signal for copyright purposes and it does not agree to indemnify the cable operator for the increased copyright liability that would result from carriage of that station.^{20/} Had Congress sought to ensure that a station electing must carry would be carried throughout the entire ADI, whether "distant" for copyright purposes or not, it could have mandated that the FCC revise its Section 76.51 list to make television markets coextensive with their associated ADIs or amended Section 111 of the Copyright Act of 1976.

^{17/} 1992 Cable Act § 2(a)(9); see also H.R. Rep. No. 628, 102d Cong., 2d Sess. 75 (1992) ("the must carry and channel positioning provisions in the bill are the only means to protect the federal system of television allocations. . . ") ("House Report").

^{18/} 1992 Cable Act § 2(a)(10).

^{19/} See Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 207 (D.C. Cir.), cert. denied, 250 U.S. 1007 (1956) ("in requiring a fair and equitable distribution of service Section 307(b) encompasses not only the reception of an adequate signal but also community needs for programs of local interest and importance and for organs of local self-expression").

^{20/} 47 U.S.C. § 534(h)(1)(B)(ii). Cf. § 534(h)(1)(B)(iii) (excluding from the definition of a "qualified" local commercial television station stations that fail to deliver to cable systems a good quality or a baseband video signal); 47 U.S.C. § 534(h)(1)(C)(2) (permitting the exclusion of non-local communities from a station's television market).

It did not do so.^{21/} Similarly, Congress could have ensured that one must-carry station would not assert exclusivity rights against another. Again, it did not do so.^{22/} Neither the must carry rules nor Section 76.51 were designed to serve as vehicles for a station to significantly expand its television market beyond the area it is licensed to serve.

Having determined, consistent with the statute, not to engage in a wholesale revision of Section 76.51,^{23/} the Commission should not now allow WLIG, WMBC, or any other station to expand its must carry rights by having its community of license incorporated into a neighboring television market. Such a result is contrary to statutory intent, and is particularly unjustified in the instant case in view of petitioners' failure to demonstrate "commonality" between their communities of license and the New York television market.

^{21/} In fact, the legislative history indicates that Congress in no way intended the must carry provisions to affect copyright law. House Report at 92 ("Nothing in this provision . . . is intended to affect federal copyright law"). Congress's only mandate with respect to the Section 76.51 list was for the FCC to include in its must carry regulations "necessary revisions to update Section 76.51." 47 U.S.C. § 534(f). There is no indication on the face of the statute or in the legislative history that this provision was intended as an invitation to the Commission to conform the Section 76.51 list to the ADI market definition adopted for must carry purposes.

One television station in fact characterized the "qualifications" for must carry status, including copyright indemnification, as "built-in safeguards to avoid a station acquiring mandatory carriage rights in a community to which it has no service nexus." Joint Opposition of WTZA-TV Associates and WTZA-TV Associates Limited Partnership to Petition for Special Relief, In re Petition of Cablevision Systems Corporation For Modification of the New York ADI, CSR-3873-A (filed July 28, 1993) at 18.

^{22/} To the contrary, as the Commission recognizes, Congress explicitly provided that a station's right to carriage of its entire signal was subject to the Commission's exclusivity provisions. Must Carry Report and Order, 8 FCC Rcd at 2979, citing 47 U.S.C. § 534(b)(3)(B).

^{23/} Id. at 2978.

III. THE COMMISSION SHOULD NOT FURTHER HYPHENATE THE MARKET TO INCLUDE OTHER COMMUNITIES IN THE NEW YORK ADI ABSENT A SPECIFIC REQUEST FOR RULEMAKING

The Commission has also solicited comment on whether hyphenation is warranted for various other communities located within the New York ADI, including the communities of Secaucus, Bridgeport, Poughkeepsie, Kingston and Smithtown, even though the stations licensed to these communities have not sought such redesignation or made any showing of competitive "commonality," the existence of any "local" nexus with the existing New York market communities, or the need for redesignation.^{24/} For the reasons indicated above,^{25/} the Commission should not automatically redesignate the market to include these communities. Redesignation of the market to include these communities is particularly unwarranted, moreover, since some of these communities are located at opposite ends of the expansive New York ADI (e.g., Kingston, New York and Riverhead, New York; Bridgeport, Connecticut and Newton, New Jersey). As the Commission correctly recognizes, stations licensed to such communities do not truly compete with one another.^{26/}

The Commission should be particularly wary of joining stations that do not genuinely compete in a common market, given the fact that market hyphenation significantly expands the geographic area in which a station may assert its program exclusivity rights. Hyphenation of all of these communities could enable a station located at one end of the New York ADI to assert syndex rights against a cable system located at the opposite end of the ADI (even though

^{24/} Notice at ¶ 15.

^{25/} See supra pp. 3-7.

^{26/} See Notice at ¶ 16.

the station is not carried because of failure to deliver a good quality signal), potentially resulting in a loss of valuable programming on the affected system.^{27/}

Given these circumstances, and in keeping with past practice,^{28/} the Commission should refrain from adding not only the communities of license of WLIG and WMBC to the New York television market, but also other communities within the New York ADI unless and until the stations licensed to these communities make the particularized showing required to warrant redesignation. In the alternative, if the Commission believes that some relief is warranted for these stations, it should grant such relief by taking steps less drastic than the wholesale revision of the New York market^{29/} to include every community within the New York ADI, regardless of whether the stations licensed to those communities serve distinct areas, fail to provide service to one another or to compete in any meaningful way.

^{27/} The syndex rules allow stations in a hyphenated market to enforce exclusivity rights against all cable systems located within the 35-mile zone of each community in the hyphenated market. See Program Exclusivity in the Cable and Broadcast Industries, Memorandum Opinion and Order, 4 FCC Rcd 2711, 2729 (1989), 47 C.F.R. § 76.151, Note. Under the rules, a station licensed to a hyphenated community could assert its syndex rights even if it was not carried in the particular cable community, so long as the affected programming was provided by a non-excepted station under the rules. See Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd 5299, 5314 (1988) (providing that a "station's right to exercise its syndicated exclusivity rights will not depend on its carriage by a cable system.")

^{28/} See Notice at ¶ 15 n.15, citing Must Carry Report and Order at 2978 n.149; Press Broadcasting Company, Inc., 8 FCC Rcd 3667, n.1 (1993).

^{29/} Steps short of full-market adjustment include waivers of the territorial exclusivity rule, as suggested by the Commission. Notice at ¶ 14. "Partial" hyphenations, while preferable to any hyphenation which joins non-local communities in a market (Notice at ¶ 15), are a potential solution; however, such hyphenations should not be made simply to relieve a station of copyright liability associated with carriage, see supra, pp. 5-7. Absent a compelling showing of commonality with the communities proposed to be joined, including a showing reflecting genuine competition among stations in the market, and that the station's signal is actually "local" to the already designated communities, the requested hyphenation should not be made.

CONCLUSION

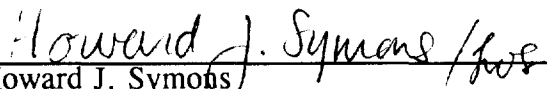
For the foregoing reasons, the Commission should deny WMBC's and WLIG's request for market redesignation. Any other redesignations of the New York television market should be considered on a case-by-case basis, and only in response to station requests.

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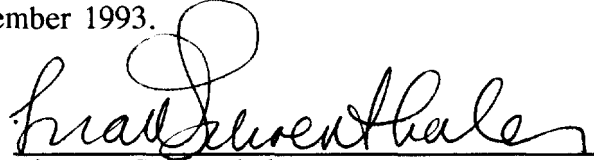
Its Attorneys

December 20, 1993

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CERTIFICATE OF SERVICE

I, Lisa W. Schoenthaler, do hereby certify that a copy of the foregoing Comments of Cablevision Systems Corporation was served on the following by either hand delivery or first class mail, postage prepaid, this 20th day of December 1993.



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